MOTION FILED
AUG 24 1977

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES URGING THE COURT TO GIVE PLENARY CONSIDERATION TO THE PRESENT APPEALS

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August 24, 1977

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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Public Citizen and the National Resource Center for Consumers of Legal Services hereby move the Court for leave to file the accompanying brief *amici curiae* urging the Court to grant plenary review in the above-entitled actions and to give adequate consideration to the consumer interests involved in those actions.

INTERESTS OF *AMICI*

Amici are two broad based consumer-oriented organizations whose interests will be directly affected by the disposition of the present proceedings. Each *amicus* has a significant organizational interest in improving the quality, availability and delivery of legal services, and each represents the interests that its individual members and supporters have in obtaining important information about the lawyers who are available to represent them.

Public Citizen is a non-profit organization supported by contributions from approximately 65,000 individuals annually. It engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws and ethical restrictions that govern the price and quality of professional services as well as the dissemination of information about those services, especially as they relate to lawyers. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules[1] and challenging the constitutionality of statutory prohibitions on drug price advertising.[2] In addition, Public Citizen has attempted to publish its own consumers' directory of physicians but has been forced by low physician participation to commece litigation challenging on First Amendment grounds the constitutionality of an advertising restriction that prohibits doctors from being listed in such directories.[3] Public Citizen has also submitted *amicus* briefs in the cases of *Jacoby*

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[1] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[2] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[3] *Public Citizen v. Commission on Medical Discipline of Maryland*, No. 76-1944 (4th Cir., appeal pending).

v. State Bar of California, No. LA 30601 (Cal. Sup. Ct., May 3, 1977), and *Bates v. State Bar of Arizona*, ___ U.S. ___, No. 76-316 (June 27, 1977), both of which held that consumers have a right of access, protected by the First Amendment, to certain information about attorneys and their practices.

The National Resource Center for Consumers of Legal Services (the "Resource Center") is a non-profit organization funded by foundations and by its members, which include labor unions, cooperatives, credit unions, and other consumer groups. The Resource Center represents more than 27,000,000 individual consumers of legal services throughout the United States. A principal purpose of the Resource Center is to foster the growth and development of legal service delivery plans for low and middle income persons and to provide assistance to individuals and organizations that wish to establish such plans. Because the successful establishment and operation of these plans depends upon the ability of attorneys to disseminate information about their practices to consumers, the Resource Center is committed to improving the flow of such information. The Resource Center also participated *amicus curiae* in the *Jacoby* and *Bates* cases.

The interests presented by *amici* in this case are the interests of consumers in having meaningful access to information enabling them to determine when legal services may be useful, and allowing them to make informed choices among available lawyers and delivery systems. The informational interests of consumers are not identical to the interests of attorneys in disseminating information about their practices, but both interests are similar; consumers cannot secure meaningful access to information about attorneys if the attorneys are prevented from effectively disseminating that information. In fact, Last Term in *Bates*,

the majority opinion "deem[ed] it significant" that consumer organizations supported the elimination of the advertising ban struck down in that case. Slip Op. at 26 n.35. Consequently, presentation of the consumer interests will assist the Court in making an informed decision concerning the proper disposition of the present appeals.[4]

Respectfully submitted,

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[4] Although *amici* sought the consent of the parties to the filing of this brief, they were unable to obtain consents from all of the parties involved. Consequently, *amici* have made the present motion.

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INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out in the accompanying motion for leave to file a brief *amici curiae*.

STATEMENT OF THE CASES

Appellants in the two above-entitled actions are attorneys who have been disciplined for violating state prohibitions on solicitation which mirror the prohibitions contained in the American Bar Association's Code of Professional Responsibility. Both appellants were found to have violated DR2-104(A), which prohibits an attorney from accepting employment resulting from unsolicited advice given to laypersons concerning their legal rights. In addition, appellant Ohralik was found to have violated DR 2-103(A), which prohibits attorneys from recommending the employment of themselves or their partners or associates to non-lawyers, and appellant Smith was found to have violated DR 2-103(D), which prohibits attorneys from assisting organizations that promote or pay for their legal services. All three provisions restrict the flow of information from lawyers to consumers but consumer interests were not considered by either State Supreme Court below.

In No. 76-1650, appellant Ohralik was found to have violated the solicitation prohibitions by accepting employment from two women in a personal injury case under circumstances suggesting that he would not have been retained as their counsel if he had not taken certain actions to promote his own services. Both women ultimately became dissatisfied and discharged appellant Ohralik, but he had already asserted damage claims on their behalf and subsequently obtained the maximum statutory recovery for one of the women. Although appellant Ohralik initially claimed attorneys fees from both women, he persisted only in his claim against the woman for whom a recovery had been obtained. This claim was finally settled by payment of a fee equal to one-third of the total recovery.

For reasons that do not appear in the opinion below, both women filed grievance complaints against appellant Ohralik. The Ohio Board of Commissioners on Grievances and Discipline found that violations had occurred and recommended a public reprimand. The Supreme Court of Ohio sustained this finding but increased the punishment to indefinite suspension from practice. Neither the Board of Commissioners, nor the Ohio Supreme Court made detailed findings of fact. The record does not indicate whether the women were misled or deceived in any way. It does not show whether appellant Ohralik provided any valuable legal service to either woman, or whether he merely pressed an insurance claim that they could have successfully asserted themselves without a lawyer. The record also fails to show whether the women knew about their legal rights or were made aware of them only as a result of appellant Ohralik's actions. Moreover, the record does not show which specific actions the Supreme Court of Ohio found to violate the solicitation rules, nor does it show what abuses the Ohio Court believed that it was guarding against in ordering the imposition of sanctions. The record does not even indicate why the Supreme Court of Ohio found it necessary to significantly increase appellant Ohralik's punishment beyond that recommended at the administrative level.

In No. 77-56, appellant Smith, a black female attorney, was found to have engaged in improper solicitation by offering the services of the American Civil Liberties Union free of charge to an indigent woman who desired to sue her physician after he forced her to undergo a sterilization operation in order to continue receiving Medicaid benefits. Appellant Smith was requested by a non-lawyer representative of a local community organization to meet with several sterilized women to inform them of their legal

rights. It is not clear who initially desired this meeting, but after the meeting the organization's representative informed appellant Smith that one of the sterilized women wished to file suit against her doctor. Appellant Smith then wrote to the women offering the legal services of the ACLU at no cost. Shortly thereafter, however, at the instruction of the doctor's attorney, the woman telephoned appellant Smith from the doctor's office, to inform her that she did not wish to file suit after all. Appellant Smith did not communicate with the woman any further. Nevertheless, the physician's attorney related these events to the South Carolina Attorney General and to the Board of Commissioners on Grievances and Discipline, and disciplinary proceedings were initiated against appellant Smith for solicitation. The Board found that appellant Smith had unethically solicited a client on behalf of the ACLU and recommended a private reprimand. The South Carolina Supreme Court sustained the finding of improper solicitation, but *sua sponte* increased her punishment to a public reprimand.

Again, the record is barren of any evidence of injury to any person resulting from appellant Smith's actions, and the South Carolina Supreme Court never gave any indication whatsoever of the danger that it was guarding against by disciplining appellant Smith. In addition, the legal analysis contained in the Board's Panel Report, which was simply adopted in full by the South Carolina Supreme Court, is grossly inadequate. Difficult legal points were either glossed over completely or dealt with in conclusory terms, and the substantial constitutional problems raised by appellant Smith were treated as trivial. Moreover, appellant Smith's actions do not even seem to fall within scope of the prohibitions that she was found to have violated. Finally, as in *Ohralik*, the South Carolina Supreme

Court gave no indication of why it believed that increased punishment was warranted.

ARGUMENT

This Court should accord plenary review to the present appeals and should consider them together. Taken together the two appeals present a broader range of consumer concerns than is likely to be presented by any single case, thereby providing the Court with an opportunity to address the constitutional issues raised by soliciation prohibitions in a context that will allow a better resolution of those issues. If the Court does not grant plenary review, however, it should nonetheless vacate the two judgments below because appellees have not made the factual findings necessary to withstand First Amendment scrutiny set forth in this Court's decision in *Bates v. Arizona State Bar*, No. 76-316 (June 27, 1977), and have not found that discipline would best serve the consumer interests involved.

I. PLENARY REVIEW OF THE PRESENT APPEALS IS WARRANTED

In a long line of cases culminating in *Bates v. Arizona State Bar, supra*, this Court has repeatedly held that when states regulate activities in an area protected by the First Amendment, the regulations must be narrowly drafted to eliminate a specified evil and must not unnecessarily intrude upon protected speech. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 827-29 (1975). The Court's decision *Bates* also established that First Amendment protections apply to certain information communicated by lawyers to consumers. However, the solicitation prohibitions drafted by

the American Bar Association and adopted by nearly every state, seem to completely ignore the First Amendment. They use an axe where this Court has required the use of a scalpel, and as the present appeals indicate, they are capable of producing the same results in vastly differing fact situations. Moreover, although solicitation rules are purportedly designed to protect consumers, neither of the cases presently before the Court even paid lip service to the many consumer interests that are affected. As currently drafted, solicitation rules appear to be little more than potent weapons that state bars can use to discipline lawyers on an arbitrary basis regardless of the effect on consumer interests. As such, those rules can potentially be used to take back many of the benefits that this Court granted in *Bates*. This danger is heightened by the fact that, although the American Bar Association recently modified its advertising rules in light of the *Bates* decision, it refused to alter its solicitation rules, even though urged to do so by several consumer organizations, including *amici*.

The conclusion that the present solicitation rules must be re-examined is inescapable, and *amici* believe that the present appeals provide a uniquely appropriate context for this Court to undertake the necessary re-examination. When taken together, the present appeals raise many of the consumer interests that are related to the issue of solicitation. If attorneys fail to advise consumers about legal remedies available to them for fear of soliciting by subsequently accepting employment, the interest of consumers in having easy access to information is adversely affected. If attorneys who are particularly well suited to handle a particular case, or who might provide low cost legal services, refuse to do so for fear of soliciting, the interest of consumers in healthy competition and easy access to available attorneys is adversely affected. *Cf. United States v. National Society of Professional Engineers*, 555 F.2d 978, 984 (D.C. Cir. 1977). Moreover, if consumer-oriented organizations are severely limited in their activities by solicitation rules, consumers are deprived of one of their most effective sources of information and legal representation. On the other hand, if consumers are deceived or misled by over-zealous attorneys seeking new business, or are taken advantage of by attorneys who approach them when they are particularly susceptible to duress or coercion, the interest of consumers in making reasoned and informed decisions is adversely affected. All of these interests are arguably involved in the present appeals, and by considering them together, the Court will have before it a broader range of consumer interests than is ever likely to be presented in a single case.

The *Smith* case presents a situation in which solicitation prohibitions have apparently been used solely to prevent a victimized welfare mother from learning about and pursuing her legal remedies through an available attorney. Although solicitation rules are designed to protect the consumer, it can hardly be in the consumers' best interest to deprive them of the right to be told that they have a legal claim *and* that an attorney will represent them in advancing it without charge. The *Ohralik* case raises the specters of duress and ambulance chasing that are typically cited to justify solicitation rules, but that case suggests that the present rules may be overly strict since consumers appear to be better able to protect themselves than paternalistic bar associations would have us believe. Both cases expose the tremendous amount of discretion that the imprecise solicitation rules vest in state disciplinary bodies and demonstrate that those bodies are not above the questionable exercise of their powers; one cannot read the opinions below without concluding that both attorneys were in fact

being disciplined for reasons that do not appear in the record. The chilling effect that the threat of such disciplinary actions can have on the willingness of attorneys to speak freely with consumers may well be substantial. With both cases before the Court at the same time, it is less likely that any particular feature or type of solicitation will be overemphasized or that the Court will overlook the impact that a decision rendered in one context will have in another context.

The organized bar's current condemnation of virtually all solicitation is as untenable as its earlier condemnation of virtually all advertising. The constitutional and policy issues surrounding solicitation are important ones, and both consumers and the legal profession will benefit from this Court's guidance at the present time. Consequently, the Court should address those issues by granting plenary consideration of the present appeals.

II. AT THE VERY LEAST, THE JUDGMENTS BELOW SHOULD BE SUMMARILY VACATED

If the Court does not grant plenary review of the present appeals, it should, at the very least, vacate the judgments below. In both cases, the administrative and judicial opinions totally failed to consider any of the truly relevant factors. In neither case did the Court attempt to relate the actions under review to any substantive evil that was likely to occur, and in neither case were factual findings made to show what effect the Court's actions would have on the interests of consumers. In *Smith*, the challenged actions do not even appear to violate the language of the South Carolina disciplinary rules, let alone pose any danger that those rules were designed to prevent. In *Ohralik*, the record simply does not contain the findings necessary to determine whether, on balance, the appellant's two clients were ultimately helped or harmed by his actions, or whether they were able to adequately protect themselves from those actions without resort to the anti-solicitation rules. Aside from whatever injustice was done to the attorneys by these sketchy and conclusory proceedings, the injustice to consumers alone requires vacation of the judgments below. If lawyers can look forward to no more than the minimal substantive and procedural safeguards present in these cases, they will certainly be deterred from freely communicating with consumers.

It might be argued that a remand for further proceedings would be appropriate since the State Supreme Courts in both cases rendered their decisions prior to this Court's decision in *Bates*. However, *amici* believe that further proceedings would needlessly perpetuate uncertainty concerning the constitutionality of solicitation prohibitions. Even though there are large gaps in the records of both cases, the facts and legal analysis which do appear are sufficient to show that the broad solicitation rules currently in force pose serious First Amendment problems. Moreover, further proceedings would be especially inequitable with respect to appellant Smith since the South Carolina proceedings conducted to date have amounted to little more than harassment, and since the appellant has already once been denied federal court protection from the ordeal of those proceedings. *See American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1922 (1976). However, if the Court should decide to remand for further proceedings, it should direct the State Supreme Courts to give primary consideration to the consumer interests involved, since those interests are what provide the basis for solicitation rules.

CONCLUSION

The interests of consumers and the legal profession will be best served if this Court addresses the constitutional issues related to solicitation rules in the context of the present appeals. The Court should, therefore, grant plenary review and consider both cases together. If the Court does not grant plenary review, however, it should at the very least vacate the judgments below.

Respectfully submitted,

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